

6304.71 PRESOLICITATION AND PREAWARD REVIEW AND APPROVAL OF PROPOSED CONTRACT ACTIONS

ISSUING OFFICE: DAPE/OAMP/OA 301-496-6014

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1. **Explanation of Material Transmitted:** This Manual Chapter provides updated guidance on the selection and submission of Presolicitation and Preaward files to the NIH Board of Contract Awards for review.

2. **Filing Instructions:**

Remove: NIH Manual 6304.71, Presolicitation and Preaward Review and Approval of Proposed Contract Awards, dated June 28, 2000.

Insert: NIH Manual 6304.71, Presolicitation and Preaward Review and Approval of Proposed Contract Awards, dated June 11, 2002.

Distribution: Electronic distribution only.

PLEASE NOTE: For information on:

- ◆ content of this chapter, contact the Division of Acquisition Policy and Evaluation, OAMP, OA, on 301-496-6014.
- ◆ NIH Manual System, contact the Division of Management Support, OMA, OA, on 301-496-2832.
- ◆ on-line information, enter this URL: <http://www1.od.nih.gov/oma/manualchapters/>

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A. PURPOSE

This Manual Chapter implements the requirements of the Health and Human Services Acquisition Regulation (HHSAR)(48 C.F.R. Chapter 3) 302.101 and HHSAR 304.71. HHSAR 302.101, Definitions, delegates the responsibilities of the Head of the Contracting Activity (HCA) to the Director, Office of Acquisition Management and Policy (OAMP). As HCA, the Director, OAMP, is responsible for conducting an “effective and efficient acquisition program that includes the establishment of adequate controls to assure compliance with applicable laws, regulations, procedures and the dictates of good management practices.” Under HHSAR 304.71, Review and Approval of Proposed Contract Awards, the HCA must establish procedures for the review and approval of proposed contract actions to ensure that: (1) each action is in conformance with law, established policies and procedures, and sound business practices; (2) each contract action properly reflects the mutual understanding of the parties; and (3) the Contracting Officer (CO) is informed of deficiencies and items of questionable acceptability and corrective action is taken. This Manual Chapter also provides for the electronic submission of presolicitation files.

B. BACKGROUND

The Federal Acquisition Regulation (FAR)(48 C.F.R. Chapter 1) requires agency Procurement Executives to oversee their agency's acquisition system. HHS implements this requirement, in part, through HHSAR 302.101, Definitions, and HHSAR 304.71 Review and Approval of Proposed Contract Awards. Prior to the January 2001 publication of the HHSAR, contract files were required to be reviewed at established dollar thresholds. This HHSAR regulation was modified by the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM), Office of the Secretary, as described in a memorandum dated April 17, 1995. The revised HHSAR incorporates the practices authorized by the DASGAM and does not include thresholds. The HHSAR also delegates the requirement to establish review and approval procedures for all contract actions with the HCA. To fulfill these and previous review requirements, the NIH has established the NIH Board of Contract Awards (Board).

During FY 1996, the Board randomly selected files for review from lists provided by the contracting offices. However, since NIH Institutes and Centers (ICs) cannot always establish funding priorities at the beginning of each fiscal year, ICs experienced difficulties in providing full and accurate lists of proposed projects

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making the use of random sampling impracticable. Therefore, after reviewing acquisition regulations and the procedures for HCA level reviews in place at that time, a subcommittee of the Acquisition Management Committee (AMC) recommended that Chief Contracting Officers (CCOs) be allowed, within stated parameters, to select contract files for HCA level reviews. In that way, each office would be in a better position to control its workflow and use HCA level reviews as a management tool.

C. POLICY

It is the NIH policy to implement the acquisition oversight requirements of the FAR and the HHSAR by performing presolicitation and preaward reviews of contract files through the Board. This policy establishes the parameters for Board reviews and establishes the procedures under which it operates.

D. REFERENCES

1. FAR 2.101, Definitions
2. FAR 7.103, Agency-head responsibilities
3. FAR 7.105, Contents of written acquisition plans
4. HHSAR 302.101, Definitions
5. HHSAR 304.71, Review and Approval of Proposed Contract Awards
6. HHSAR 307.71, Requests for Contract
7. NIH Manual Issuance [6035](#), Broad Agency Announcements
8. NIH Manual Issuance [6315-1](#), Review and Evaluation of R&D Contract Proposals

E. APPLICABILITY OF REVIEWS

OAMP shall select files from all awarding offices in accordance with the procedures stated in Section G., Selection of Files for Review. Files from the National Library of Medicine (NLM), which is designated a "Reinvention Laboratory," will be included in special subject reviews only and as requested by the CCO, NLM.

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F. REVIEWERS

1. The Board Chair is the Director, Division of Acquisition Policy and Evaluation (DAPE), or other OAMP senior staff member, as designated by the HCA.
2. The Chair will determine the composition of the Board on a case-by-case basis. In addition to the Chair, the Board typically will include one procurement analyst for presolicitation reviews. For preaward reviews, the Board typically will include a procurement analyst and a financial analyst.
3. As needed, the Chair may call upon subject experts, e.g., staff of the Office of Extramural Research, the Office of the General Counsel (OGC), the Center for Information Technology, the Small Business Office and other disciplines to provide advice to the Board. The Chair also may request that a staff member from the ICs, who has significant experience with the types or subject requirements under review, serve on an ad hoc basis.
4. The Chair may request the CCOs to assign senior Contract Specialists to serve on the Board for cross-training purposes or to assist in reviews as necessary. Individuals so assigned may not participate in a review of a requirement processed in their contracting office.

G. SELECTION OF FILES FOR REVIEW

The CCOs are responsible for selecting files from their respective offices to be reviewed by the Board with the exception of files designated by the HCA under G.2., Judgmental Samples, below. The CCO may select files for either a presolicitation or preaward review.

1. Selection Criteria

This selection process ensures that the Board reviews a broad spectrum of the kinds and types of awards made by awarding offices during a given fiscal year. Files for presolicitation review may be planned for award either in the current fiscal year or in the next fiscal year. The CCOs have broad discretion to select files to be reviewed by the Board. CCOs should consider selecting actions that fall into the following categories:

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- requirements estimated to exceed \$500,000;
- performance-based contracting requirements;
- innovative approaches to contracting;
- requirements which have a high risk/impact on the public;
- special patent or data rights issues;
- hybrid contract types;
- construction management contracts;
- design-build requirements, and
- sealed-bid requirements when the proposed award is to other than the low bidder.

CCOs also should consider other issues such as workload distribution between teams and COs within an organization and types and methods of contracts awarded by each office, e.g., fixed-price, cost-reimbursement, Indefinite-Delivery-Indefinite-Quantity, and requirements contracts. Selected files must fairly represent the commodities and services obtained by each office, e.g., clinical trials, services and supplies.

Please note the following guidance when selecting files for review:

- a. The Board will not review the files of sole source acquisitions that already have been submitted to DAPE for Justification for Other Than Full and Open Competition approval.
- b. Generally, the Board will not review Small Business Innovation Research (SBIR) Phase I files because they are fixed-price and of small dollar value. SBIR Phase I files may only be reviewed when, in the opinion of the CCO, there are special circumstances and the CCO has obtained the prior approval of the Chair.

2. Judgmental Samples

- a. At the direction of the HCA, the Chair may identify a single contract or select a judgmental sample of contracts for review from specified awarding offices. (An example of judgmental sampling is when the HCA wishes to conduct a special subject review in a single office or across several awarding offices.)

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- b. All multiple awards pursuant to FAR 16.5, Indefinite-Delivery Contracts, and multi-agency/Governmentwide Agency Contract awards must be submitted for Board review at both the presolicitation and the preaward stage. At the preaward stage, the Chair will determine the number or percentage of new awards to be reviewed from a single solicitation. The CCO must inform the Chair once the approximate number of anticipated multiple awards is decided.

3. Number of Files to be Reviewed

The total number of files submitted for review should be approximately ten percent of the average number of new awards for the previous three fiscal years, with a minimum of one file per year from each awarding office. As the number of awards varies each year, this total may be adjusted annually. In addition, the Chair may adjust the total upward or downward in conjunction with the HCA, based on unusual or extenuating circumstances. For purposes of determining the number of files to be reviewed, SBIR Phase I awards will be excluded. The Chair will provide the CCOs the number of files for review once data for the previous fiscal year is finalized.

If a CCO believes that extenuating circumstances warrant either an increase or decrease in the review number, the CCO should submit a request in writing (e-mail acceptable) to the Chair explaining the extenuating circumstances. The final decision for determining the number of files to be reviewed during a given fiscal year rests with the HCA.

H. NOTIFICATION AND SUBMISSION OF CONTRACT FILES

1. CCOs should provide a list of the files to be reviewed by the Board to the Chair by November 30 of each fiscal year. Preliminary lists of files for Board review should be based on the same number of files required by the Board in the previous fiscal year. As soon as data is available in the NIH or Department's Contracts Information System, the Board will determine the number of files that must be reviewed based on the three previous fiscal years in accordance with G.3., and make any necessary adjustments. COs are encouraged to submit files for review during the first quarter of the fiscal year. To the extent practicable, CCOs should submit files throughout the fiscal year.

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2. The list of files must indicate the nature of the project, (e.g., clinical trial, building construction management, or other contract category), the estimated value of the project, the anticipated date of release of the Request for Proposal (RFP) or the date of award, and the approximate date for submission of the file to the Board. The CCOs should inform the Chair of any significant deviations from planned submissions. Mutually agreeable substitutions from planned submissions may be made.
3. Files should be submitted to the OAMP, DAPE, Room 6C01, 6100 Executive Blvd., Rockville, MD 20892 (United States Postal Service) or 20852 (courier), Mail Stop 7540, Attention: NIH Board of Contract Awards.
4. COs shall allow five working days for presolicitation reviews and seven working days for preaward reviews. Files received before 12 noon are logged in as of the day received. Files logged in after 12 noon are logged in as of the following working day.
5. The fiscal year-end deadline for receipt of presolicitation and preaward files is 10 working days before the end of the fiscal year. Exceptions to the deadline require prior approval of the Chair.
6. Presolicitation files may be submitted to the Board after the RFP is issued, but at least 5 working days prior to receipt of proposals. Files in which the RFP already has been issued must be clearly marked to indicate when the RFP was issued and when receipt of proposals is anticipated.
7. Files for contracts awarded before the Board completes its review are considered postaward reviews and cannot be used by the awarding organization to fulfill its obligation under this Manual Issuance.
8. Documentation to be Furnished
 - a. Presolicitation Reviews

COs must provide the Board with copies of the Acquisition Plan, the Request for Contract (RFC), the Statement of Work, the Independent Government Cost Estimate, the Peer Concept Review (when applicable), a copy of the proposed or actual FedBizOpps Announcement, a copy of

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the completed DHHS Small Business Review Form 653, and a copy of the full RFP. (RFPs may be made available online.) Although NIH has a deviation that allows its acquisition offices to use a combined acquisition planning and RFC document, COs nevertheless are responsible for ensuring that all requirements contained in FAR 7.105, Contents of written acquisition plans and HHSAR 307.71, Requests for Contract adequately are addressed in the file. **It is important that copies (and *not original documents*) be submitted in presolicitation files because only the Board's findings will be returned to the awarding office.**

DAPE has established an electronic mail box. The address is Dape1@od.nih.gov. (It is listed on the NIH Global Address List as Dape 1(OD).) Presolicitation files in common software applications, e.g., WordPerfect and Microsoft Word, can be submitted electronically. Absent clear evidence of signature(s), the CO must include a statement certifying that the required signature(s) have been obtained. Please notify the Chair electronically and the DAPE staff by telephone at 301-496-6014 prior to submitting any documents using this medium. The receipt date will be determined by the date Chair is notified. [Note: Parts of the presolicitation file may be submitted electronically. CCOs still must continue to submit preaward files in hard copy.]

b. Preaward Reviews

COs must provide the Board with the entire preaward contract file. COs must review FAR 4.803, Contents of contract files, when determining appropriate documentation to include for preaward contract files. Proposals from unsuccessful offerors need not be furnished. Instead, a list of the unsuccessful proposals shall be included in the file. In the case of sealed bids, when a rejected bid is lower in price than the accepted bid, the rejected bid must be included with the file for review.

In accordance with guidance from the OGC, CCOs shall submit decisional documents including the Summary of

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Negotiations and the Source Selection Document as unsigned drafts to facilitate incorporation of changes recommended by the Board. If decisional documents are signed prior to submission to the Board and the Board recommends changes, COs must include the change as an addendum to the document.

- c. Internal File Reviews for Presolicitation and Preaward Files must document review by other than the Contract Specialist/CO responsible for drafting/negotiating the acquisition prior to planned submission to the Board. Corrections as a result of the internal review must be made prior to submitting the file.
 - d. If a file submitted for preaward review also was submitted for a presolicitation review, this must be indicated in a cover memorandum. The file shall include the minutes from the presolicitation review and response to the Board minutes in the file.
9. The HCA will return files that lack essential documentation to the CO without Board review. The files will not be counted toward an awarding office's total requirement under this Manual Issuance until they are submitted later with complete documentation. Examples of this include those lacking the RFC document and/or lack of corrections to the file as a result of the awarding office's internal review.

I. SCOPE OF REVIEWS

- 1. The Board's written review Minutes will encompass the full scope of contracting considerations.
 - a. Substantive Issues

The Board Minutes will identify substantive issues that the CO must resolve prior to proceeding. In general, substantive issues include, but are not limited to, the following types of problems:

 - (1) Statutory requirements or prohibitions overlooked or disregarded. Examples of issues

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that arise in presolicitation reviews include a lack of concept review, or applicable waiver, or failure to include the provisions and clauses pertaining to the Service Contract Act of 1965, as amended, when applicable.

- (2) For presolicitation reviews, evaluation criteria that are not clearly stated or restrictive criteria that are not justified.
- (3) Evidence of faulty administrative judgment on the part of the CO, e.g., for presolicitation reviews, when a contract is not the appropriate instrument and for preaward reviews, when the file does not clearly document that the proposed award will be made to the appropriate source.
- (4) Major administrative clearances not obtained, such as the equal opportunity employment clearance on a preaward review.
- (5) For preaward reviews, an award document that fails to reflect the essential agreement of the parties, e.g., when the contract document and the Final Proposal Revision are significantly different.

b. Advisory Issues

All recommendations raised by the Board, other than the Substantive Issues raised in accordance with I.1.a. above, are advisory. Whenever possible, advisory issues should be resolved prior to award.

c. Other Matters

These issues generally do not reflect upon the legal or regulatory sufficiency of an acquisition, but may, nevertheless, reflect on the overall appearance and quality of the file. Therefore, these matters are brought to the attention of the CO for corrective action and/or for commendation.

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2. Response to Board Minutes/Recommendations

a. Substantive Issues

During a presolicitation or preaward review, if the Board judges an issue to be substantive, the Chair shall notify the CCO immediately. The Chair, in consultation with the HCA, will require the CO to resolve the substantive issue and submit documentary evidence to that effect. After consulting with the HCA, the Chair may grant oral approval of the proposed resolution. The Chair shall provide a written addendum to the Minutes indicating that the issue was resolved.

In the case of a presolicitation review, if appropriate, the CO must amend the RFP and the amendment furnished to the Board to resolve the substantive issue. Alternatively, a formal memorandum detailing how the CO will resolve the issue is acceptable. The CO must resolve substantive issues on presolicitation reviews no later than the proposal due date.

In the case of a substantive issue on a preaward review, the CO either must forward the correction or revision to the proposed contract resolving the substantive issue or provide a memorandum explaining the intended resolution. The CO must resolve a preaward substantive issue before awarding the contract.

b. Advisory Issues

The CO shall respond to the Board's Minutes, addressing disposition of Advisory Issues, within thirty (30) working days from the date the Board notified the contracting office of the conclusion of its review. Responses must be sent to the Board through the CCO. Please note that responses to the Board must indicate the disposition of the comment. Since the Board Minutes complete the cycle of an important Management Control for acquisition, responses such as "noted" are not acceptable since they do not indicate how the issue was resolved.

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c. Other Matters

It is not necessary to respond to the Board about the disposition of "Other Matters." However, it is strongly recommended that the CO correct minor issues, e.g., typographical errors, prior to the release of the document to the public.

d. If the CO's response to the Board is not received after 30 days, the CO will be reminded to submit the response. After 60 days, the CCO will be notified that the response has not been received.

J. RECORDS RETENTION AND DISPOSAL

All records (e-mail and non-e-mail) pertaining to this Chapter must be retained and disposed of under the authority of the NIH Manual Chapter [1743](#), Keeping and Destroying Records, Appendix 1, NIH Records Control Schedule, Items 2600-A, "Procurement," 2600-B, "Public Buildings and Space," and 6000, "Research Contracts."

NIH E-Mail Messages: NIH e-mail messages (messages, including attachments that are created on the NIH computer systems or transmitted over the NIH networks) that are evidence of the activities of the agency or have informational value are considered Federal Records. These records must be maintained in accordance with current NIH Records Management Guidelines. Your IC Records Officer should be contacted for additional information.

All e-mail messages are considered Government property, and if requested for a legitimate Government purpose, must be provided to the requester. Employees' supervisors, the NIH staff conducting official reviews or investigations, and the Office of Inspector General may request access to or copies of the e-mail messages. E-mail messages must also be provided to Congressional Oversight Committees if requested and are subject to the Freedom of Information Act requests. Since most e-mail systems have back-up files that are retained for significant periods of time, e-mail messages and attachments are likely to be retrievable from a back-up file after they have been deleted from an individual's computer. The back-up files are subject to the same requests as the original messages.

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K. MANAGEMENT CONTROLS

This Manual Issuance establishes procedures for the submission of presolicitation and preaward contract files to the Board.

1. **The Office Responsible for Reviewing Management Controls Relative to this Chapter:** OAMP.
2. **Frequency of Review** (in years): OAMP reviews percentages of new awards from each contracting office annually, based on a percentage of new contracts awarded by NIH during the previous three fiscal years. The Board reviews approximately ten percent of the new contracts awarded with a minimum of one file from each awarding office.
3. **Method of Review:** Reviews are conducted by the Board and are used by the NIH HCA to determine if acquisitions at the NIH are being conducted properly and in compliance with the law and regulations. The Board conducts reviews in accordance with the FAR, the HHSAR, the NIH Manual Chapters, and other applicable policies and guidance.
4. **Review Reports:** Reviews of individual presolicitation or preaward files are sent to the appropriate CCO for either immediate corrective action or remedial action within 30 days. OAMP issues a compilation of recurring problems annually to the AMC. The AMC is responsible for recommending to the HCA the need for new or revised policies and procedures and the need to provide for new or revised training to the NIH acquisition community.